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No. 01-1862

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, WARDEN, *Petitioner*,

v.

ROBERT FREDERICK GARCEAU, *Respondent*.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

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CAPITAL CASE
QUESTION PRESENTED

1. In *Lindh v. Murphy*, 521 U.S. 320 (1997), this Court held that Chapter 153 of the Antiterrorism and Effective Death Penalty Act ("the AEDPA") (28 U.S.C. §§ 2241-2255) does not apply to cases pending prior to the AEDPA's April 24, 1996, effective date. The circuits are split as to when a capital case commences for purposes of determining the application of the AEDPA. With one exception, all the circuits to consider the issue have found the AEDPA applies if the petition for habeas corpus relief was filed on or after the AEDPA's effective date. However, in the Ninth Circuit, the AEDPA does not apply to a federal petition filed on or after April 24, 1996, if motions for appointment of counsel and stay of execution were filed before that date. *Calderon v. United States District Court (Kelly)*, 163 F.3d 530 (9th Cir. 1998) (en banc). This conflict presents the following question:

What is the correct trigger event for determining the application of the AEDPA in capital cases?

TABLE OF CONTENTS

	Page
OPINION BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	9
I. THE APPLICATION OF THE AEDPA TO A CAPITAL CASE IS PROPERLY DETERMINED BY THE DATE THE FEDERAL HABEAS PETITION WAS FILED	9
A. The Plain Meaning Of "Pending" Applies	9
B. This Court's Decisions In *McFarland v. Scott* And *Hohn v. United States* Do Not Justify A Deviation From The Plain Meaning Of "Pending"	11
II. THE NINTH CIRCUIT'S FAILURE TO APPLY THE DEFERENTIAL REVIEW PROVIDED IN 28 U.S.C. § 2254 RESULTED IN THE IMPROPER REVERSAL OF GARCEAU'S CAPITAL CONVICTION	17
CONCLUSION	22

TABLE OF AUTHORITIES

Cases	Page
Ashmus v. Woodford, 202 F.3d 1160 (9th Cir. 2000)	5
Brecht v. Abrahamson, 507 U.S. 619 (1993)	5, 21
Calderon v. United States District Court (Kelly), 163 F.3d 530 (9th Cir. 1998) (en banc)	*Passim*
Chapman v. California, 386 U.S. 18 (1967)	18, 19, 21
Estelle v. McGuire, 502 U.S. 62 (1991)	5, 7, 20, 21
Ex Parte Quirin, 317 U.S. 1 (1942)	14
Gosier v. Welborn, 175 F.3d 504 (7th Cir. 1999)	10, 11, 14
Hohn v. United States, 524 U.S. 236 (1998)	6, 12-14
Holman v. Gilmore, 126 F.3d 876 (7th Cir. 1997)	14
Isaacs v. Head, 300 F.3d 1232 (11th Cir. 2002)	10, 11, 15

TABLE OF AUTHORITIES (continued)

	Page
Lindh v. Murphy, 521 U.S. 320 (1997)	*Passim*
McFarland v. Scott, 512 U.S. 849 (1994)	6, 11-14
McKinney v. Rees, 993 F.2d 1378 (9th Cir. 1993)	5
Moore v. Gibson, 195 F.3d 1152 (10th Cir. 1999)	10, 11
People v. Watson, 466 Cal.2d 818 (1956)	20
Slack v. McDaniel, 529 U.S. 473 (2000)	6, 15
Spencer v. Texas, 385 U.S. 554 (1967)	20, 21
Williams v. Cain, 125 F.3d 269 (5th Cir. 1999)	10, 11, 13
Williams v. Coyle, 167 F.3d 1036 (6th Cir. 1999)	10, 11, 13, 14
Williams v. Taylor, 529 U.S. 362 (2000)	18
Woodford v. Visciotti, 537 U.S. ___, 2002 WL 31444314 (Nov. 4, 2002)	17

TABLE OF AUTHORITIES (continued)

	Page
Statutes	
110 Stat. 1226, Public Law 104-132	
§ 107(c)	2, 9
21 U.S.C.	
§ 848	16
§ 848(q)(4)(B)	4, 6, 12, 13
§ 848(q)(8)	13
28 U.S.C.	
§ 1254	6, 13, 14
§ 1254(1)	1
§ 2241(d)	10
§ 2242	10
§ 2251	12, 13
§ 2253	15
§ 2254(d)	17
§ 2254(d) and (e)	4, 7, 10, 17
§ 2254(d)(1)	15, 17, 21
§ 2254(d)(1) and (2)	2
§ 2254(d)(2)	17
§ 2254(e)(1)	10, 17
§§ 2241-2255	2, 9
§§ 2243-2250, 2255	10

TABLE OF AUTHORITIES (continued)

	Page
Court Rules	
Federal Rules of Civil Procedure	
Rule 3	11
Supreme Court Rule 14.1(a)	17
Other Authorities	
Antiterrorism and Effective Death Penalty Act ("the AEDPA")	
Chapter 153	*Passim*
Chapter 154	2, 4, 9
Black's Law Dictionary 1134 (6th ed. 1990)	11
Rules Governing § 2254 Cases	6, 11
Rule 2	11

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JEANNE WOODFORD, WARDEN, *Petitioner*,

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On Writ Of Certiorari To The
United States Court Of Appeals For The Ninth Circuit

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit") is reported at 275 F.3d 769 (Pet. App. 1-26).

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit was entered on December 26, 2001. A petition for rehearing was denied on February 15, 2002 (Pet. App. 27-28). On May 8, 2002, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including June 15, 2002. The petition for a writ of certiorari was filed on June 13, 2002, and granted on October 1, 2002. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the application of the Antiterrorism and Effective Death Penalty Act of 1996 ("the AEDPA"), Chapter 153, 28 U.S.C. §§ 2241-2255 (Pet. App. 180-95), and that provision of Chapter 154, 110 Stat. 1226, Public Law 104-132, section 107(c), which provides:

> (c) EFFECTIVE DATE. -- Chapter 154 of title 28, United States Code (as added by subsection (a)) shall apply to cases pending on or after the date of enactment of this Act.

The provisions of 28 U.S.C. § 2254(d)(1) and (2), and (e), contained in Chapter 153 of the AEDPA, provide in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
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> * * *

STATEMENT OF THE CASE

In September 1984, Robert Garceau stabbed to death his girlfriend, Maureen Bautista, and her 14-year-old son, Telesforo Bautista. Their bodies were not found until six months later, in a bedroom dresser buried under a layer of concrete in the backyard of one of Garceau's drug partners, Greg Rambo. Garceau's drug partners testified that he confessed to the murders. They further testified that he had returned to the scene with two of his drug partners and stuffed the bodies into the dresser. Garceau and Greg Rambo then transported the dresser to Rambo 's house and buried it. A few months after the Bautista murders, Greg Rambo was shot to death. (Pet. App. 103-04.)

On June 15, 1987, Robert Garceau was convicted in Kern County Superior Court, California, of two counts of first degree murder, enhanced with a finding of personal use of a deadly or dangerous weapon. A special circumstance finding based on multiple murders was found true. The jury returned a verdict of death. (Pet. App. 102-03.)

The California Supreme Court affirmed the judgment in 1993. (Pet. App. 102-79.) The court held that the trial court erroneously instructed the jury that evidence of Garceau's other crimes ("other-crimes evidence") could be considered as it bore on Garceau's character. However, the court held that the admission of the other-crimes evidence was non-prejudicial under any standard of review and, therefore, it did not need to decide if the instruction constituted a denial of due process.

Garceau filed a petition for a writ of habeas corpus with the California Supreme Court, which was denied on September 1, 1993. Garceau then filed a petition for writ of certiorari with this Court, which was also denied. 513 U.S. 848 (1994).

On May 12, 1995, having completed direct review, Garceau filed an ex parte application for a stay of execution and a request for appointment of federal habeas counsel, pursuant to 21 U.S.C. § 848(q)(4)(B), in the United States District Court for the Eastern District of California. The application stated Garceau's future intention to file a petition for writ of habeas corpus to present "multiple meritorious claims of violations of petitioner's federal constitutional rights." (Resp. App. 203, 205.) By order issued May 12, 1995, the proceedings were stayed to permit appointment of counsel. (Resp. App. 199.) Six weeks later, counsel was appointed and a temporary stay of execution was granted to permit the preparation of the petition. (Resp. App. at 211-12.)

On April 24, 1996, the AEDPA went into effect. Garceau filed a federal petition for a writ of habeas corpus on July 2, 1996, which the district court subsequently denied. (Pet. App. 30-101.) Among its other determinations, the district court applied a presumption of correctness to the California Supreme Court's finding that the erroneous jury instruction permitting the jury to consider Garceau's other-crimes evidence for any purpose, including Garceau's character and propensity to commit murder, constituted harmless error. (Pet. App. 86.)

The Ninth Circuit reversed. As a threshold matter, the court ruled that the AEDPA did not apply to Garceau's petition. Applying the interpretation announced by the Ninth Circuit in *Calderon v. United States District Court (Kelly)*, 163 F.3d 530 (9th Cir. 1998) (en banc), the Court ruled that Garceau's federal habeas corpus petition was "pending" as of May 12, 1995, the day Garceau requested appointment of federal habeas counsel and a stay of execution. Since these events preceded the enactment of the AEDPA, the provisions of that statute, including 28 U.S.C. § 2254(d) and (e), were found not to apply. (Pet. App. 6.)[1/]

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1. The special capital case provisions of Chapter 154, which expressly apply even to cases pending at the time of the AEDPA's enactment, were not applicable to Garceau's case.

Freed of the provisions of the AEDPA, the Ninth Circuit applied a *de novo* standard of review, and looked to its own jurisprudence in analyzing Garceau's due process claim based on the instructional error. (Pet. App. 8-15.) The Ninth Circuit acknowledged that this Court has specifically declined to determine whether due process is violated by the admission of other-crimes evidence for the purpose of showing conduct in conformity therewith, or whether it violates due process to admit other-crimes evidence for other purposes without an instruction limiting the jury's consideration of the evidence to such purposes. (Pet. App. 10-11 (citing *Estelle v. McGuire*, 502 U.S. 62, 75 n.5 (1991).) However, applying Ninth Circuit authority as stated in *McKinney v. Rees*, 993 F.2d 1378, 1384 (9th Cir. 1993), the court found that the jury instruction in question violated due process. The Ninth Circuit also found that the error was prejudicial under the standard of *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

The State filed a petition for rehearing and rehearing en banc, which was denied on February 15, 2002. (Pet. App. 27-28.)

SUMMARY OF ARGUMENT

This case involves the issue of when a capital habeas corpus proceeding commences for purposes of determining the applicability of Chapter 153 of the AEDPA. In *Lindh v. Murphy*, 521 U.S. at 320, this Court held that Chapter 153 did not apply to non-capital cases pending prior to the AEDPA's April 24, 1996, effective date. *Lindh* did not address the event necessary to create a "pending" capital case.

Applying the plain meaning of "pending" to capital cases, a habeas corpus case begins with the filing of the application for habeas corpus relief. A review of the provisions

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Ashmus v. Woodford, 202 F.3d 1160 (9th Cir. 2000), as amended.

of Chapter 153, and the Rules Governing § 2254 Cases, shows a clear intention to have the provisions apply to "applications for writ of habeas corpus." Given these provisions, it is reasonable to conclude that the proper "trigger event" for determining the application of the AEDPA provisions is the filing of the application for writ of habeas corpus, rather than some earlier procedural event.

The Ninth Circuit erroneously relies on this Court's opinions in *McFarland v. Scott*, 512 U.S. 849 (1994) and *Hohn v. United States*, 524 U.S. 236 (1998) to find that a capital habeas case commences with the filing of requests for appointment of counsel and stay of execution. *Kelly*, 163 F.3d at 539-40. These cases do not support a deviation from the plain meaning of "pending" for purposes of determining whether Chapter 153 of the AEDPA applies to capital cases. Both of these cases confronted a specific issue, and did not address the issue of the correct application of Chapter 153. *McFarland* interprets the meaning of a "post-conviction proceeding" in order to give effect to the clear congressional intent behind 21 U.S.C. § 848(q)(4)(B), which provides for appointment of counsel in capital cases. *Hohn* stands only for the proposition that the denial by the district court of a motion for the issuance of a certificate of appealability ("COA"), or a motion for leave to file a petition for the writ, constitutes an appealable "case" for purposes of granting certiorari jurisdiction pursuant to 28 U.S.C. § 1254.

The Ninth Circuit's approach is also flawed because preliminary acts, such as requesting appointment of counsel and a stay of execution, should not be used to determine the application of the AEDPA's substantive provisions, which address the merits of filed habeas corpus petitions. Also, as this Court found in *Slack v. McDaniel*, 529 U.S. 473 (2000), there is no requirement that all proceedings having any relation to a habeas petition be viewed as a unified whole. Therefore, the earlier filing of preliminary motions need not determine the application of the AEDPA, if the application for habeas corpus relief was filed after the AEDPA's enactment.

Finally, there is no justification for using a different trigger event in capital cases than is used in noncapital cases. In the latter, the application of the AEDPA is determined by the filing of the habeas corpus petition. The substantive provisions of Chapter 153 are intended to apply to both types of cases. *See Lindh v. Murphy*, 521 U.S. at 326. Also, a rule which limits the number of capital cases to which the substantive provisions apply thwarts the AEDPA's general purpose to "enhance the States' capacities to control their own adjudications." *Id.* at 334, n.7.

Garceau's requests for appointment of counsel and stay of execution were filed before the April 24, 1996, effective date of the AEDPA. His petition for writ of habeas corpus on the merits was filed after that date. Garceau raised a due process violation arising from an instructional error which allowed the jury to consider other crimes evidence for the purpose of assessing his character and propensity to commit the current crimes. The California Supreme Court considered and denied the claim. Garceau's case should have been, but was not, subject to the deferential standard of review provided in 28 U.S.C. §§ 2254(d) and (e), and the state court's adjudication of his claim should have been upheld.

After determining that the provisions of the AEDPA did not apply to Garceau's case, the court was free to engage in *de novo* review of the state capital conviction, and apply its own jurisprudence. Although the Ninth Circuit acknowledged that this Court had declined to find a due process violation based on the admission of other crimes evidence in *Estelle v. McGuire*, 502 U.S. at 75 n.5, it found a due process violation based on its own Ninth Circuit precedent. It also imposed its own contrary assessment of the weight of the evidence to overcome the California Supreme Court's finding that even a constitutional error would have been harmless given the "overwhelming" evidence of guilt. The Ninth Circuit's determination that the AEDPA did not apply resulted in the reversal of Garceau's capital conviction.

This Court's determination that a capital case commences, for purposes of applying the AEDPA, with the filing of the petition for habeas corpus relief will resolve this important issue, correct the injustice resulting from the reversal of Garceau's conviction, and ensure the application of the AEDPA to other capital cases in the Ninth Circuit.

ARGUMENT

I.

THE APPLICATION OF THE AEDPA TO A CAPITAL CASE IS PROPERLY DETERMINED BY THE DATE THE FEDERAL HABEAS PETITION WAS FILED

A. The Plain Meaning Of "Pending" Applies

In *Lindh v. Murphy*, 521 U.S. at 320, this Court considered whether the provisions of Chapter 153 (28 U.S.C. §§ 2241-2255) applied retroactively in habeas cases pending at the time of the AEDPA's effective date. Based on the absence of express statutory language of retroactivity in Chapter 153, it was determined that those provisions did not apply to pending habeas cases.[2/] *Lindh* did not address the issue of the "trigger event" necessary to create a pending federal habeas corpus case for purposes of determining the application of the AEDPA to capital cases. The plain meaning of "pending" should be applied, and the necessary event determined to be the filing of the application for federal habeas corpus relief.

In *Calderon v. United States District Court* (*Kelly*), 163 F.3d 530, the Ninth Circuit determined that the filing of requests for appointment of counsel and stay of execution before the April 24, 1996 effective date of the AEDPA creates a "pending" case not subject to the AEDPA's provisions, even

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2. This Court relied heavily on the fact that Chapter 154, which contains special provisions applying to capital cases, included an express statement of retroactivity to pending cases. See Chap. 154, § 107(c). Therefore, if Congress intended Chapter 153's provisions to be retroactive to pending cases, it would have made the same expression of intent. *See Lindh*, 521 U.S. at 327.

if the petition for writ of habeas corpus was filed after that date. This opinion is wrongly decided and contrary to the conclusion reached by the Fifth, Sixth, Seventh, Tenth and Eleventh Circuits, all of which use the date the habeas corpus petition was filed to determine the AEDPA's application. *Isaacs v. Head*, 300 F.3d 1232, 1239, n.1 (11th Cir. 2002); *Moore v. Gibson*, 195 F.3d 1152 (10th Cir. 1999); *Gosier v. Welborn*, 175 F.3d 504, 506 (7th Cir. 1999); *Williams v. Coyle*, 167 F.3d 1036, 1040 (6th Cir. 1999); *Williams v. Cain*, 125 F.3d 269, 274 (5th Cir. 1999).

Garceau filed his requests for counsel and stay of execution on May 12, 1995. The habeas corpus petition was filed on July 2, 1996. Applying *Kelly*, the Ninth Circuit found that Garceau's case was pending as of the filing of the requests for appointment of counsel and stay of execution. Since the case was "pending" at the time of the effective date of the AEDPA, its provisions were inapplicable. Garceau's state conviction was subject to *de novo* review, rather than the more deferential review provided in 28 U.S.C. § 2254(d) and (e). The failure to apply these provisions resulted in the granting of the habeas petition, and the improper reversal of Garceau's capital conviction.

The plain meaning of "pending" supports the conclusion that Chapter 153 applies to applications for habeas corpus filed on or after the AEDPA's effective date, and that this is unaffected by the earlier filing of other preliminary matters. A review of the provisions of Chapter 153 show a clear intention to have the provisions apply to "applications for writ of habeas corpus." See 28 U.S.C. §§ 2241(d), 2243-2250, 2255. Section 2254(e)(1) even refers to "a proceeding instituted by an application for a writ of habeas corpus." Section 2242 details the requirements for an "application for a writ of habeas corpus." It must be in writing, signed and verified by the petitioner, or someone acting in his behalf. It must allege the facts concerning the applicant's commitment or detention, the name of the person who has custody of petitioner and by virtue of what claim or authority. The petition is required to set forth

the grounds for relief, and provide, in summary form, the facts supporting each of the specified grounds. Rules Governing § 2254 Cases, Rule 2. Given these provisions, it is reasonable to conclude that the proper "trigger event" for determining the application of these provisions is the filing of the application for writ of habeas corpus. *See McFarland v. Scott*, 512 U.S. at 862, (O'Connor, J., concurring in part and dissenting in part) (The provisions of the pre-AEDPA habeas corpus statute, and the Rules Governing § 2254 Cases, indicate that a "pending" case is created by the filing of the habeas corpus application.).

There is no justification for deviating from the plain meaning of the word "pending." "In ordinary usage a case is pending when a complaint or petition is filed." *Williams v. Coyle*, 167 F.3d at 1038, citing *Black's Law Dictionary* 1134 (6th ed. 1990). This definition is applicable in habeas cases because Federal Rules of Civil Procedure, Rule 3, provides that "[a] civil action is commenced by the filing of a complaint with the court." The Federal Rules of Civil Procedure may be applied to habeas cases to the extent they are not inconsistent with the Rules Governing § 2254 Cases, and, as to this definition, there is no inconsistency. *Williams*, at 1038. *See also Isaacs v. Head*, 300 F.3d at 1243 (quoting *Williams*, 167 F.3d at 1038 and adopting its explanation of "pending"); *Williams v. Cain*, 125 F.3d at 274 (adopting the filing date of the petition as the "obvious approach" to defining "pending"); *Moore v. Gibson*, 195 F.3d at 1163 (applying ordinary meaning of "pending" and requiring the filing of "a petition seeking substantive relief"); *Gosier v. Welborn*, 175 F.3d at 506 (requiring the filing of "a collateral attack on a criminal judgment").

B. This Court's Decisions In *McFarland v. Scott* And *Hohn v. United States* Do Not Justify A Deviation From The Plain Meaning Of "Pending"

In *Kelly*, the Ninth Circuit adopted a broader

interpretation of "pending case" which includes the filing of the requests for appointment of counsel and stay of execution in capital cases. If these were filed before the AEDPA's effective date, Chapter 153 is not applied. The Ninth Circuit relied on this Court's opinions in *McFarland v. Scott*, 512 U.S. at 849, and *Hohn v. United States*, 524 U.S. at 236, to conclude that these preliminary matters are within the definition of "case."

In *McFarland*, this Court considered two statutory provisions related to habeas cases: 21 U.S.C. § 848(q)(4)(B), which creates a statutory right to qualified legal representation for capital defendants in federal habeas proceedings, and 28 U.S.C. § 2251, which grants a federal judge before whom a habeas proceeding is pending the power to stay any related state court proceeding. The lower courts in *McFarland* had refused to appoint habeas counsel for the defendant pursuant to § 848(q)(4)(B) because the defendant had not yet filed a habeas petition. *Id.* at 851-54.

This Court noted that § 848(q)(4)(B) "grants indigent capital defendants a mandatory right to qualified counsel and related services '[i]n any [federal] post conviction proceeding,'" but the statute does not "define a 'post conviction proceeding' under § 2254 or § 2255 or expressly state how such a proceeding shall be commenced." *Id.* at 854-55 (quoting § 848(q)(4)(B)) (brackets in original). Since the "interpretation [of the statute to permit the appointment of counsel prior to the filing of a formal petition] is the only one that gives meaning to the statute as a practical matter," this Court concluded that a "post conviction proceeding" within the meaning of § 848(q)(4)(B) is commenced by the filing of a death row defendant's motion requesting the appointment of counsel for his federal habeas corpus proceeding. *Id.* at 855-57.

After reaching that conclusion, this Court went on to address the similar issue of whether a federal court has authority to stay state court proceedings pursuant to 28 U.S.C. § 2251 prior to the filing of a formal habeas petition. Section 2251 grants any federal judge "before whom a habeas corpus proceeding is pending" power to enjoin related state court

proceedings. 28 U.S.C. § 2251. This Court held that the provisions of §§ 848(q)(4)(B) and 2251 must be similarly interpreted to ensure that once a capital defendant invokes his right to appointed counsel, a federal court also has jurisdiction under § 2251 to enter a stay of execution in order to permit the preparation of the habeas petition. *McFarland*, 512 U.S. at 857-58.

McFarland's holding rests on the necessity of expanding the ordinary meaning of a "pending case" in order to give effect to congressional intent to provide defendants with legal assistance, and to provide sufficient time to prepare habeas petitions. *Williams v. Coyle*, 167 F.3d at 1039. It was intended to "resolve practical procedural problems." *Williams v. Cain*, 125 F.3d at 274. *McFarland* did not "answer the question of what date a habeas petition becomes 'pending' for determining the applicability of substantive statutes." *Id.* It does not support a deviation from the presumption that a habeas corpus case commences with the filing of the application for habeas corpus.

Furthermore, a request for counsel under 21 U.S.C. § 848(q)(4)(B) may be filed at any time by a federal or state defendant, and it applies, not just to habeas corpus proceedings, but to any available post-conviction procedure, including clemency and competency proceedings (§ 848(q)(8)). Given the broad scope of § 848 proceedings, it is not likely that Congress intended to exempt any "case" from the substantive provisions of the AEDPA merely because the request for counsel was initiated prior to the enactment of the AEDPA.

In *Hohn v. United States*, 524 U.S. at 236, this Court addressed whether a court of appeals' denial of a COA application constituted a "case" such that this Court had certiorari jurisdiction pursuant to 28 U.S.C. § 1254 to review the denial. *Id.* at 241. This Court examined the process utilized by the court of appeals in addressing Hohn's application for the COA, as well as the adversary nature of the proceeding. It was determined that "[t]he dispute over Hohn's entitlement to a

certificate falls within [the] definition" of a case for the purposes of § 1254. *Id.*

Hohn's holding relied on *Ex Parte Quirin*, 317 U.S. 1 (1942), which confronted the "analogous question" of whether a request for leave to file a petition for a writ of habeas corpus constituted a "case" in a district court. This Court found that the request for leave constituted a case in the district court over which the court of appeals could assert jurisdiction, even though the district court had denied the request. Since a suit is instituted by the presentation of the petition for judicial action, the denial of leave to file the petition is a judicial determination of a case or controversy, reviewable on appeal to the Court of Appeals. *Hohn*, 524 U.S. at 246, interpreting *Ex Parte Quirin*, 317 U.S. at 24.

Hohn defines "case" in a significantly different context from a determination of whether the AEDPA's provisions apply to capital cases. As stated by Judge Cynthia Holcomb Hall, in her dissent in *Kelly*, "[T]he words may appear the same, but their meanings are vastly different." *Kelly*, 163 F.3d at 544.[3/] Unlike a request for a certificate of appealability, which goes to the merits of a habeas case, requests for appointment of counsel and stay of execution do not constitute a post-conviction proceeding seeking relief from injury. They do not involve a collateral attack on a criminal judgment so as to constitute a case under Chapter 153 of Title 28. *Gosier v. Welborn*, 175 F.3d 504; *see also Williams v. Coyle*, 167 F.3d 1036, quoting *Holman v. Gilmore*, 126 F.3d 876, 880 (7th Cir. 1997) ("[T]he motion for counsel is not itself a petition, because it does not call for (or even permit) a decision on the merits.

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3. Given the fact that *Hohn* was issued in 1998, after the enactment of the AEDPA, the reasoning of that case could not have been considered by Congress when it enacted the AEDPA. *Kelly* acknowledged that, until the publication of *Hohn*, *McFarland v. Scott*, 512 U.S. 849, published in 1994, did not support a determination that a "case" began with the filing of a request for counsel. *Kelly*, 163 F.3d at 539.

And it is 'the merits' that the amended § 2254(d)(1) is all about."). As the Eleventh Circuit stated in *Isaacs v. Head*, 300 F.3d at 1245:

> We agree that, in a sense, the filing of a motion for appointment of counsel or other threshold motions might initiate some form of "case," at least in the constitutional sense. However, such a motion does not necessarily mark the genesis of the habeas case under § 2254. A motion for appointment of counsel has no relation to the merits of a habeas petition and does not seek any form of merits relief from a district court. Such a motion does not even assure that a habeas case will ever materialize. For example, an appointed counsel could well conclude that the would-be petitioner has no colorable claims to present. Therefore, only when an actual habeas petition is filed seeking relief from a conviction or sentence does § 2254 come into play.

There is also no requirement that all proceedings having any relation to a habeas petition must be viewed as a unified whole. *Slack v. McDaniel*, 529 U.S. 473. *Slack* expressly recognized that a court, in order to determine the applicable provisions of the AEDPA, must determine what is "the relevant case." *Id.* at 482. In *Slack*, this Court looked to the filing date of the notice of appeal, rather than the filing date of the application for habeas relief, to determined whether the the post-AEDPA provisions of 28 U.S.C. § 2253 applied. *Id.* The Eleventh Circuit, in *Isaacs v. Head*, 300 F.3d at 1245-46, relied on this reasoning in rejecting the *Kelly* rule:

> We believe that it follows--from the Supreme Court's recognition that an appellate case may be subject to AEDPA even though the underlying district court proceedings were not--that even though a motion for appointment of counsel was filed before AEDPA and

> was not subject to its provisions, a later-filed habeas petition may nonetheless be governed by the stricter AEDPA standards that took effect in the interim. The simple fact is, at the time AEDPA became the law, Isaacs' habeas case was not pending because it had not yet been filed and he had not asked the district court for any type of merits relief that could be characterized as habeas relief. . . .

Lastly, the provisions of Chapter 153 should be equally applied to both capital and non-capital cases. *See Lindh v. Murphy*, 521 U.S. at 326 (the provisions of Chapter 153 apply to all habeas corpus cases). A non-capital applicant must have filed an actual petition for habeas relief prior to April 24, 1996, in order for those provision to be inapplicable. There is no § 848 pre-application procedure in non-capital cases, and there is nothing about a § 848 proceeding that implicates the substantive changes in Chapter 153. In addition, an interpretation which results in a smaller number of capital cases being subject to the AEDPA provisions thwarts "the Act's general purpose to enhance the States' capacities to control their own adjudications." *Id.* at 334.

II.

THE NINTH CIRCUIT'S FAILURE TO APPLY THE DEFERENTIAL REVIEW PROVIDED IN 28 U.S.C. § 2254 RESULTED IN THE IMPROPER REVERSAL OF GARCEAU'S CAPITAL CONVICTION

Applying an erroneous trigger event, the Ninth Circuit determined that Garceau's habeas corpus case was pending prior to the enactment of the AEDPA and not subject to its provisions. As a result, the court applied *de novo*, rather than deferential review, and Ninth Circuit jurisprudence, to reverse Garceau's capital conviction. This Court granted certiorari to resolve the issue of the correct trigger event for determining the application of the AEDPA in capital cases. The State asks this Court to also resolve this capital case on the merits, as the merits determination appears to be fairly included or comprised within the stated question. Supreme Court Rule 14.1(a). The State challenged the erroneous trigger event, and the resulting reversal, in the petition for rehearing filed in the Ninth Circuit.

The provisions of the AEDPA – specifically those contained in 28 U.S.C. § 2254(d) and (e) – provide for deferential review of state criminal convictions. *See Lindh v. Murphy*, 521 U.S. at 334 n.7 (28 U.S.C. § 2254(d) creates a "new highly deferential standard for evaluating state court rulings"); *Woodford v. Visciotti*, 537 U.S. ___, 2002 WL 31444314 (Nov. 4, 2002), per curium (state court decisions must be given "the benefit of the doubt"). These provisions prohibit a grant of habeas relief if a claim was adjudicated on the merits in state court, unless the adjudication of the claim was contrary to, or involved an unreasonable application of, this Court's clearly established precedent (28 U.S.C. § 2254(d)(1)), or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding (28 U.S.C. § 2254(d)(2).) Section 2254(e)(1) grants a presumption of correctness to state court

factual determinations. The Ninth Circuit's determination that the provisions of the AEDPA did not apply to Garceau's case allowed it to engage in *de novo*, rather than deferential, review. Moreover, application of the *Kelly* rule permitted the Ninth Circuit to extend and apply its own jurisprudence, rather than clearly established United States Supreme Court precedent. *See Williams v. Taylor*, 529 U.S. 362, 405 (2000) (United States Supreme Court precedent is applied).

In both state and federal court, Garceau claimed his due process rights were violated by a jury instruction allowing other crimes evidence to be considered for the purpose of determining his character and his conduct on a specific occasion. The jury, in addition to hearing evidence pertaining to the victims' deaths, received evidence pertaining to Garceau's illegal drug activity and the murder of Greg Rambo. Garceau objected only to the instruction, and not to the admission of the evidence. (Pet. App. 138-42, and n.17 [jury instruction given].) The California Supreme Court found that California law does not permit other crimes evidence, and found that there was a possibility that the erroneous instruction impaired Garceau's constitutional right to due process by lightening the prosecution's burden. Without deciding the issue, the Court assumed a constitutional violation existed and found the error harmless under the test of *Chapman v. California*, 386 U.S. 18, 24 (1967) (harmless beyond a reasonable doubt). (Pet. App. 141.)

The California Supreme Court's finding of harmless error was discussed in detail in its published decision. Prior to trial, the defense advised the court that it would not object to the prosecutor introducing facts of the Rambo murder in the prosecution's case-in-chief because the defense intended to use the Rambo killing to reinforce the defense being offered. The defense was that one or more of Garceau's acquaintances, and fellow participants in a drug operation, had a motive to commit both the Bautista and Rambo murders. Based on the defense's statement that the defense would not object to the admission of the Rambo murder evidence, the prosecutor requested, and the

court gave, over defense objection, the erroneous special instruction advising the jury that it could consider the other crimes evidence for numerous purposes, including Garceau's "character or any trait of his character." (Pet. App. 138-39.)

The California Supreme Court found that the probative value of the other crimes evidence was diluted because the defense desired the jury to consider the evidence for the purpose of establishing Garceau's innocence. Weighed against the "overwhelming evidence establishing defendant's guilt of the charged offenses," the Court found the special instruction led to cumulative, rather than unduly prejudicial, use of the evidence. (Pet. App. 142.) The evidence against Garceau included "defendant's damning trail of incriminating statements, and circumstantial evidence linking him to the Bautista murders." *Id.* The circumstantial evidence was testimony placing Garceau at the crime scene, showing Garceau and Maureen Bautista had been arguing, establishing Garceau's fear that Maureen would "snitch him off," and corroborating Garceau's reports of the brutality of the attack, the extreme lengths Garceau went to in disposing of the bodies, and his actions to hide his involvement. (Pet. App. 142; see also Pet. App. 103-17, entitled "Facts.") Based on the totality of the evidence, the California Supreme Court found the instructional error to be harmless beyond a reasonable doubt.

In separate concurring opinions, two California Supreme Court Justices, Mosk and Kennard, also found harmless error. Justice Mosk found that, assuming a due process error occurred, it would be harmless under the *Chapman* standard. He found that, although in the general case a propensity instruction would pose a grave danger of prejudice, Garceau's case was "*not* the general case." (Pet. App. 173, emphasis in the original.) The multiple confessions, which were corroborated by both physical and testimonial evidence, "must practically compel the jury to return a guilty verdict no matter what the other evidence says or does not say." (Pet. App. 173.) Hence, the other crimes instruction proved to be

"unimportant in relation to everything else the jury considered on the issue in question." (Pet. App. 174.)

Justice Kennard found the issue of whether there was a due process violation to be presently "unclear" and noted the fact that this Court declined to address the issue in *Estelle v. McGuire*, 502 U.S. 62. (Pet. App. 176.) She also concluded that the error in question did not lighten the prosecution's burden of proof in a manner constituting a federal constitutional violation. (Pet. App. 177.) Applying the state harmless error standard of *People v. Watson*, 466 Cal.2d 818, 836 (1956) (reasonable probability that a result more favorable to the defendant would have been reached in the absence of the error), Justice Kennard found harmless error. Reviewing the evidence, she found that the jury was essentially confronted with a credibility contest. The witnesses to the "other crime" murder of Rambo were the same witnesses used in the current case. The defense did not oppose admission of the Rambo murder evidence because it viewed that evidence as less credible than the evidence of the charged murders. The defense was counting on the jury to disbelieve the prosecution's witnesses as to the Rambo murder, and thereby undermine their credibility as to the charged murders. Given this credibility contest, "it is highly unlikely that the jury in reaching its guilt verdicts relied to any significant degree on inferences about defendant's character drawn from the Rambo murder." (Pet. App. 178.)

The Ninth Circuit examined *Spencer v. Texas*, 385 U.S. 554 (1967) (no due process violation to admit other crimes evidence for purposes other than propensity, where the jury was given a limiting instruction not to consider the prior conviction as evidence of guilt in the current case), and *Estelle v. McGuire*, 502 U.S. 62, *accord*. The Ninth Circuit acknowledged that this Court, in *Estelle v. McGuire*, specifically declined to determine whether due process is violated by the admission of other crimes evidence for the purpose of showing conduct in conformity therewith, or whether due process is violated by the admission of other crimes evidence for other purposes without an instruction

limiting the jury's consideration of the evidence to such purposes. (Pet. App. 10-11 (citing *Estelle v. McGuire*, 502 U.S. at 75 n.5).)

The California Supreme Court's determination in *Garceau*, which assumed without deciding that a due process violation occurred, was not contrary to, nor did it involve an unreasonable application of *Spencer v. Texas*, 385 U.S. 554, or *Estelle v. McGuire*, 502 U.S. 62, because a finding of a due process violation was not mandated by these cases. 28 U.S.C. § 2254(d)(1). Furthermore, the Court's determination that the assumed error was harmless under even the most stringent *Chapman* standard ("harmless beyond a reasonable doubt"), was not contrary to, nor did it involve an unreasonable application of, this Court's less onerous test for harmless error on habeas review, as stated in *Brecht v. Abrahamson*, 507 U.S. at 637 ("substantial and injurious effect or influence" in determining the jury's verdict). The California Supreme Court found the evidence included "overwhelming evidence establishing defendant's guilt of the charged offenses." The California Supreme Court found the erroneous instruction led to cumulative, rather than unduly prejudicial, use of the evidence. (Pet. App. 142.) (See also the concurring opinions of Justices Mosk and Kennard, Pet. App. 172-78.) The court also found the evidence against Garceau included "defendant's damning trail of incriminating statements, and circumstantial evidence linking him to the Bautista murders." (Pet. App. 142.)

The Ninth Circuit concluded it was free of the requirements of deferential review, and engaged in *de novo* review. After acknowledging the lack of Supreme Court precedent dictating a finding of a due process violation, the Ninth Circuit looked to its own authority and concluded that the other crimes instruction given in this case violated due process. The Ninth Circuit also found the error was prejudicial under the standard in *Brecht v. Abrahamson*, 507 U.S. at 637. The court simply substituted its interpretation of the law and the facts for that of the California Supreme Court, and overturned the state capital conviction.

CONCLUSION

This judgment of the court of appeals should be reversed.

Dated: November 8, 2002.

Respectfully submitted,

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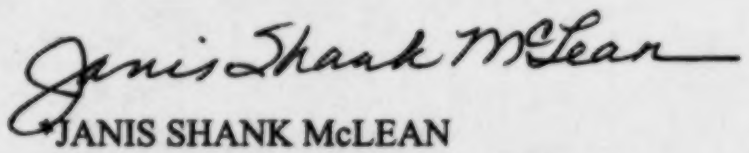

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